90-737

No. ____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID B. ZAVADIL and BARBARA ZAVADIL,
Petitioners

v.

UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF ARMY, U.S. ARMY CORPS OF ENGINEERS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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October 9, 1990

QUESTION PRESENTED

Whether the United States is immune from liability pursuant to 33 U.S.C. § 702c (1980) (Flood Control Act of 1928) for personal injuries caused by the negligent operation of a recreation area within a flood control project when that negligence is unrelated to flood control.

LIST OF PARTIES

The parties to the proceedings below were the petitioners David B. Zavadil and Barbara Zavadil (Zavadils) and the respondent United States of America, acting by and through the Department of Army, U.S. Army Corps of Engineers (United States).

SPECIAL NOTE

This Petition raises nearly identical issues as raised in a pending petition for a writ of certiorari, Supreme Court Case No. 90-147, entitled Fryman v. United States.

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Petitioners

v.

UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF ARMY, U.S. ARMY CORPS OF ENGINEERS, Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

David Zavadil and Barbara Zavadil respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 11, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 908 F.2d 334, and is reprinted in the appendix hereto, p. A-1, infra.

The memorandum opinion of the United States District Court for the District of Nebraska is reported at 715 F. Supp. 276, and is reprinted in the appendix hereto, p. A-7, infra.

JURISDICTION

Invoking federal jurisdiction under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), Zavadils brought this suit in the United States District Court for the District of Nebraska. The United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to the immunity provisions of the Flood Control Act of 1928 ("the Act"), 33 U.S.C. § 702c. On April 11, 1989, the district court granted the United States' motion and dismissed Zavadils' complaint. See p. A-7, infra.

Zavadils appealed and the United States Court of Appeals for the Eighth Circuit, on July 11, 1990, entered a judgment and an opinion affirming the district court's judgment. See p. A-1, infra. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

33 U.S.C. § 702c. Expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights.

33 U.S.C. § 702c is reprinted in the appendix hereto, A-13, infra.

STATEMENT OF THE CASE

1. Nature of the Case

David Zavadil was rendered a quadriplegic on July 2, 1985, when he dove off a boat dock at the Lewis and Clark Recreation Area ("Recreation Area") on Lewis and Clark Lake.

Lewis and Clark Lake is a reservoir on the Nebraska-South Dakota border created by the construction of the Gavins Point Dam on the Missouri River by the United States for several purposes, including flood control, hydropower,

navigation, irrigation, domestic and sanitary water supply, recreation and fish and wildlife.

Zavadils alleged that the United States was responsible for the design, development, administration, operation and maintenance of the Recreation Area, and that Mr. Zavadil's injuries were caused by the negligence of the United States. Zavadils alleged twelve separate acts or omissions of negligence, including the improper design and location of the dock and ramp, the failure to dredge the area around the dock and ramp, the use of a movable (rather than fixed) dock on the ramp, the failure to prohibit swimming and diving in the area adjacent to the dock and ramp and the failure to warn of submerged hazards and shallow water.

The Recreation Area includes a number of smaller recreation units, including the Gavins Point Unit, at which the boat dock and concrete boat ramp are located. The Gavins Point Unit has numerous other recreational facilities, including a swimming beach, change house,

restrooms, shower houses, playground, picnic shelter, hiking trails, bicycle trails, equestrian trails, a fish cleaning station, archery range, amphitheater and campground. More than two million visitors use the Recreation Area each year.

The United States' stated policy in managing water resource development projects such as the Recreation Area and lake is to provide "the public with safe and healthful recreational opportunities." 36 C.F.R. § 327.1

There is a restricted area on the lake extending 200-300 feet above and below the powerhouse at the dam to prevent boats on the lake from being drawn into the powerhouse and spillway gates as water is being discharged from the lake. The accident site is located approximately one and one-half to two miles west (upriver) from the dam, powerhouse and spillway (approximately five miles by road).

The purpose of the dock and boat ramp centers on recreation and the United States admitted the

dock and ramp had nothing to do with the flood control purposes of the dam.

Although there was a sand beach immediately adjacent to both sides of the dock and ramp, the United States' regulations prohibited swimming and diving in the area.[1] (One of the Zavadils' allegations of negligence was the United States' failure to make the public aware of, and enforce, that regulation.)

The United States' employee responsible for enforcing the water safety rules at the lake was not even aware of this regulation. Another of the United States' employees testified that swimming is permitted throughout Lewis and Clark Lake and swimming and diving had no relationship to the flood control purpose of the project. Other than the restricted areas immediately

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[1]36 C.F.R. § 327.5(a) (1985) provides: "Swimming, diving, snorkeling or scuba diving at one's own risk is permitted, except at launching sites, designated mooring points and other areas so designated by the District Engineer. Diving or jumping from bridges or other structures which cross project waters is prohibited." (emphasis added)

above and below the dam, the United States' water safety program at Lewis and Clark Lake did not relate to the flood control purpose of the project.

The United States admitted the purpose of the boat ramp and dock is recreation, and that the boat dock and ramp had nothing to do with the flood control purpose of the dam and reservoir. The United States further admitted that removal of the dock and ramp at Gavins Point would have no effect on the flood control purposes of the project, and that the dredging activities (one of the Zavadils' allegations of negligence related to dredging) had nothing to do with the flood control purpose. The only apparent relation between the land in the Recreation Area and the flood control function of the project is that some of the land, which does not include the Gavins Point Unit, is used as an emergency spillway and to store riprap materials in the event of extremely high waters.

It is uncontested that there was no flooding or flood conditions at the entire project on the day of the accident.

The only evidence offered by the United States in support of its motion to dismiss was an affidavit of an employee of United States which simply stated that one of the purposes of the dam was to control flood waters and that the dam and lake are monitored daily to adjust water discharge rates when necessary for purposes including flood control

2. The District Court Ruling

The United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure Rule 12(b)(1), alleging the United States was immune from liability pursuant to section 702c of the Act.

The district court, noting that the Zavadils' response to the United States's motion to dismiss referenced certain depositions and exhibits, ordered that (barring objection from

the parties) it would treat the motion to dismiss as a motion for summary judgment. Following that order, no further evidence was presented by the parties. The district court then entered an Order and Judgment on April 11, 1989, accompanied by a Memorandum Opinion.

The district court cited this Court's decision in United States v. James, 478 U.S. 597 (1986), and focused on the language in James that the conveyance of warnings was part of the management of a flood control project. The district court interpreted James as precluding any federal government liability for injury in connection with a flood control project. Zavadils presented other claims of negligence which were not addressed by the district court.

3. The Eighth Circuit Decision

The Zavadils appealed to the Court of Appeals for the Eighth Circuit, which issued its opinion on July 11, 1990. The court of appeals likewise found this Court's decision in James to be controlling. The appellate court reasoned that

since the lake's water level was being monitored at the time of the accident for both flood control and navigation purposes, the lake's waters met the definition of flood waters within the terms of the Act. The court of appeals then held that since governmental control of the waters was "a substantial factor" in causing Mr. Zavadil's injuries, the immunity provision of section 702c applied and the court affirmed the district court's dismissal of the Zavadils' complaint.

REASONS FOR GRANTING THE WRIT

I.

A Conflict Exists Among the Various Circuit Courts of Appeal Regarding the Application of the Immunity Provisions of 33 U.S.C. § 702c (Flood Control Act of 1928).

This Petition presents one of the extremely rare circumstances where review by this Court is warranted. Not only does this case involve a true conflict among the various circuit courts of appeal, but it has a direct impact upon the rights of the tens of millions of annual

visitors to recreational areas within flood control projects throughout the nation.

The simple fact is that if Mr. Zavadil had made his dive at a flood control project located in the Fourth or Tenth Circuits, he would have an action against the United States pursuant to the Federal Tort Claims Act. Hayes v. United States, 585 F.2d 701 (4th Cir. 1978); Boyd V. United States, 881 F.2d 895 (10th Cir. 1989). Unfortunately for Mr. Zavadil, his injury occurred within the boundaries of the Eighth Circuit and the negligence of the United States government is shielded by the cloak of immunity. DeWitt Bank & Trust Co. v. United States, 878 F.2d 246 (8th Cir. 1989), cert. denied, ___ U.S. ____, 110 S.Ct. 1318 (1990). Likewise, if Mr. Zavadil would have been injured in the Third or Ninth Circuits, his claim would also be turned aside. Dawson v. United States, 894 F.2d 70 (3d Cir. 1990); McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988), cert. denied, 489 U.S. 1052, 109 S.Ct 1312 (1989); Morici Corp. v.

United States, 681 F.2d 645 (9th Cir. 1982). Finally, while it is not entirely certain, it appears that immunity would also preclude this claim in the Seventh Circuit, although a different test is applied. Fryman v. United States, 901 F.2d 79 (7th Cir. 1990).[2] The geographic location of an injury must not be allowed to determine the outcome of an otherwise meritorious claim.

In Hayes, supra, the Fourth Circuit of Appeals reversed the district court's decision which relied on the immunity provisions of 33 U.S.C. § 702c. Hayes involved damage to property near the gates of a flood control project. The Fourth Circuit concluded that for immunity to apply, the action must "be in aid of the operation of the dam as a flood control facility." Id. at 702. The court went on to note: "If the plaintiff could prove damage to

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[2]The Plaintiff in Fryman has filed a Petition for a Writ of Certiorari, United States Supreme Court Case #90-147, which is pending.

his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c." Id. at 702-03.

Similarly, the Tenth Circuit in Boyd, supra, held that the immunity provisions of § 702c did not apply to a person struck and killed by a boat while snorkeling in the waters of a flood control project. The Tenth Circuit recognized the importance of this Court's decision in United States v. James, 478 U.S. 597 (1986), and correctly noted that § 702c "immunized the government from suit for any damages caused by floods or flood waters." Id. at 900 (emphasis added). The Boyd court went on, however, to distinguish the injuries in James from the injuries presented in Boyd and in this case:

> There is some broad language in James, but the Court appeared to distinguish cases where damages occur in waters not being actively used for flood control purposes, by twice noting that the district and appellate courts in that case had found that the waters were being released for flood control purposes at the time of the

> accident. Id. at 605 & n.7, 610, 106 S.Ct. at 3121 & n.7, 3123-24. Indeed, the Supreme Court quoted a portion of a Fourth Circuit case, and highlighted certain language; where the court had stated "[i]f the plaintiff could prove damage to his farm as the result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c." Id. at 605 n.7, 106 S.Ct. at 3121 n.7 (quoting Hayes v. United States, 585 F.2d 701, 702-03 (4th Cir. 1978)).

Id. (emphasis in original)

The Tenth Circuit in Boyd discussed the Ninth Circuit's decision in McCarthy, supra, and then clearly departed from the Ninth Circuit stating: "For our part, we cannot agree that Congress intended to stretch the shield of flood control immunity to the limit contemplated by [McCarthy]." Id.

> [The McCarthy] standard essentially creates a "but for" connection between flood control activity and damages occurring at a flood control project -- if the injury would not have occurred but for the creation of a flood control lake, the government is immune. Such a connection between flood control activity and recreational injuries is too attenuated to warrant the invocation of § 702c. The government has presented no evidence that Congress intended § 702c to cover this situation. We believe Congress' concern

> was to shield the government from liability associated with flood control operations, see James, 478 U.S. at 608, 106 S.Ct. at 3122-23, not liability associated with operating a recreational facility.

Id. It appears that the Third Circuit in Dawson, supra, and the Eighth Circuit in DeWitt have also sided with the McCarthy court.

The conflict in the circuits is further exacerbated by the different tests applied in various circuits. The Tenth Circuit looks to determine whether the liability is associated with flood control operations or with the operation of a recreational facility. The Ninth Circuit requires that the accident be "wholly unrelated" to flood control, while the Third and Eighth Circuits[3] look to whether the injuries were made more likely by the use of the lake in flood control operations. In Fryman v. United

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[3]The Eighth Circuit in rendering its opinion in this case seems to apply a "substantial factor" test stating: "Since governmental control of these waters was a substantial factor in causing the Zavadils' injuries the United States is immune from liability." Zavadil v. United States, 908 F.2d 336 (8th Cir. 1990).

States, 901 F.2d 79 (7th Cir. 1990), the Seventh Circuit appears to carve out yet another test somewhere between those applied by its sister circuits. Injured parties in the Seventh Circuit must look to whether "the problem is attributable in some substantial part to the nature of flood-control project" or whether the flood control activities increased "the probability of the injury compared with a natural lake devoted to recreational use."

The square and irreconcilable conflict between the circuits, coupled with the profound and ongoing impact on the fundamental rights of tens of millions of citizens provide compelling reasons for this Court to issue the extraordinary Writ of Certiorari requested by the Zavadils. See, e.g., McElroy v. United States, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the circuits on this issue of statutory construction"); Marks v. United States, 430 U.S.

188, 189 (1977) (certiorari granted "to resolve a conflict in the circuits").

II.

The Decision Below Fails to Correctly Apply this Court's Decision in United States v. James Which Applies Immunity Only to Negligence Associated with Flood Control.

In James, this Court made it clear that if the immunity provision of 33 U.S.C. § 702c is to apply to insulate the negligent actions of the United States, those actions must be "related to flood control" (James, 478 U.S. at 605, 106 S.Ct. at 3121), "associated with flood control" (Id. at 608, 106 S.Ct. at 3122) or "to prevent flooding" (Id. at 605 n.7, 106 S.Ct. at 3121 n.7).

James involved a situation where boaters were swept up in flood waters being drawn through the flood control facilities. As this Court observed, the injuries resulted from the intentional release of flood waters from the reservoir as part of the flood control function. As a result, this Court in James did not address the question of immunity surrounding the purely

recreational operations within the bounds of a flood control facility. That is the issue squarely presented in this case.

While the question of liability for purely recreational operations was not determined in James, this Court held throughout the decision that an important distinction exists between recreational and flood control operations. This Court specifically stated: "We have noted that here the District Court in each case found that the waters were being released from federal flood control facilities to prevent flooding." Id. at 605 n.7, 106 S.Ct. at 3121 n.7. In that same footnote, this Court quoted with emphasis the following language from Hayes v. United States, 585 F.2d 701, 702-03 (4th Cir. 1978), a case which directly supports Zavadils' position in this case:

> If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c.

James, 478 U.S. at 605 n.7, 106 S.Ct. at 3121 n.7.

The Zavadils anticipate that the United States will direct this Court's attention to language in Part IV of the James decision, relating to liability for warnings. As the Eighth Circuit noted below, three of the Zavadils' causes of action center on the United States's failure to warn of underwater dangers at the dock area. Zavadil, 908 F.2d at 336 n.4. To support its holdings, the court of appeals quoted the following language from James: "[T]he manner in which to convey warnings, including the negligent failure to do so, is a part of the 'management' of a flood control project." Id. (citing James, 478 U.S. at 610, 106 S.Ct. at 3123). It is clear from the earlier recitation of facts that this statement applies only to warning of the dangers associated with flood control. The plaintiffs in James contended they should have been warned of the dangers of being swept up by flood control waters when the gates were opened to

release waters at flood stage. The holding regarding warnings was a logical extension of the earlier portion of the James opinion since both issues centered directly on the flood control operation of the project.

The Eighth Circuit below erroneously extended this holding regarding warnings to the negligent failure to warn of conditions unrelated to the flood control aspect of the project. This distinction between flood control and recreational warnings was specifically accepted by the district court in Denham v. United States, 646 F. Supp. 1021 (W.D. Tex. 1986), aff'd, 834 F.2d 518 (5th Cir. 1987).[4] In Denham, the plaintiff dove into the water, struck his head on a submerged abandoned concrete anchor and was rendered a quadriplegic. The injury occurred in a designated swimming area in a flood control reservoir.

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[4]The Fifth Circuit in Denham did not address the Act's immunity provision and affirmed the district court on other grounds.

The Denham district court reviewed the James decision and analyzed the case in terms of the "management" issue and the "causation" issue. The court, citing Hayes, supra, stated: "[T]he Flood Control Act does not bar an action against the United States under the FTCA when, as here, the plaintiff alleges an injury unconnected with the operation of the facility as a flood control project." 646 F. Supp. at 1026. The court further noted that the factual scenario presented in James was clearly distinguishable and stated that the claimant's

> alleged acts of negligence by the Government are not part of the management of the flood control project, but are instead part of the management of the dam as a recreational facility . . . . This Court believes that the management decision of whether to warn of a rapid current at the reservoir is wholly independent and distinguishable from the decision to warn of hidden dangers at a designated swimming area or to fail to at least attempt to remove dangerous obstacles from the bottom of the swimming area.

Id.

The Denham court noted three distinct factual contrasts with James, each of which is likewise

applicable here. First, in James, the current from the release of flood waters caused the injuries; in Denham and in the instant case, flooding played no part in the injuries. Second, the injuries in James were proximately caused by the dam and dam waters; the injuries in Denham and this case were caused by striking underwater obstructions. Third, the United States' negligence in James "dealt specifically with a danger created by a dam, while the danger created by the Corps in the instant case resulted from the Corps' operation of a recreational facility, and bears no relationship to a dam or control of flood waters." Id. at 1027.

In addition to the warning issue, both the district court and the court of appeals herein seem to imply that this action was based solely on a failure to warn. This is simply not the case since only three of the twelve allegations of negligence made by the Zavadils relate to lack of warnings. Most of the allegations

relate to the location, design, construction and maintenance of the concrete ramp and boat dock. Furthermore, the allegations bear no relation to flooding or flood control. The United States's own personnel agreed that swimming and diving had no relationship to the flood control purposes of the project and that the boat dock and ramp were also unrelated to flood control.

The legislative history of § 702c makes it clear that Congress intended to establish immunity should the massive flood control projects result in flooding and damage to private property. This aspect of the legislative history was extensively quoted in James. It is improbable, however, that Congress, in 1928, anticipated that some of the projects, such as the one at issue herein, would be exclusively promoted and used by tens of millions of people for recreational purposes.

In his James dissent, Justice Stevens, joined by Justice Marshall and Justice O'Connor, noted that he had reviewed the entire legislative

history of the Act and found absolutely no reference in either the Act or the legislative history to any potential liability for personal injuries. The inescapable conclusion is that Congress did not intend an absolute prohibition against liability for any and all acts and omissions of the United States occurring at flood control projects. Justice Stevens clearly illustrated this point in his James dissent:

> It defies belief--and ascribes to the Members of Congress a perverse, even barbaric, intent--to think that they spent days debating the measure of extra-constitutional compensation they would provide riparian landowners but intended--without a single word of dissent--to condemn the widows, orphans and injured victims of negligent operation of flood control projects to an irrational exclusion from the protection of the subsequently enacted Tort Claims Act.

James, 478 U.S. 620, 106 S.Ct. 3128 (Stevens, J. dissenting).

The passage is especially applicable to situations involving the recreational operation of those facilities.

CONCLUSION

This Petition for a Writ of Certiorari should be granted since a true conflict exists in the circuits affecting the substantial rights of millions of citizens and since the lower courts incorrectly applied a decision of this Court.

Respectfully submitted,

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October 9, 1990

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1813
DAVID B. ZAVADIL and
BARBARA ZAVADIL,

Plaintiff-Appellants,

v.

UNITED STATES OF AMERICA,
acting by and through the
DEPARTMENT OF ARMY, U.S.
ARMY CORPS OF ENGINEERS,

Defendant-Appellee.

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908 F.2d 334

Appeal from the United States District Court
for the District of Nebraska
No. CV 88-L-411-**Lyle E. Strom**, Chief Judge

ARGUED FEBRUARY 14, 1990-DECIDED JULY 11, 1990

Before LAY and BEAM, Circuit Judges, and HANSON, Senior District Judge*

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* Honorable William C. Hanson, Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

PER CURIAM.

David Zavadil was rendered a quadriplegic when he struck a submerged concrete boat ramp while diving from a dock located on Lewis and Clark Lake. The lake lies between Nebraska and South Dakota and is formed by the Gavins Point Dam, located on the Missouri river. The dam was built and is owned and operated by the United States Army Corps of Engineers.

David and his wife Barbara brought this tort action against the United States under the Federal Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2674 (1988), alleging that David's injuries were caused by the negligence of the government. The district court,[1] relying on United States v. James, 478 U.S. 597, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986), granted the government's motion for summary judgment. 715 F.Supp. 276. The court found that the government was immune from

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[1]The Honorable Lyle E. Strom, United States District Court Judge for the District of Nebraska.

liability under section 702c of the Flood Control Act of 1928.[2] We affirm.

In James, recreational users were injured or killed when they were swept through flood gates opened by the Corps to release flood waters. The Supreme Court held that the plaintiffs' tort actions against the United States were barred by section 702c. In doing so, the Supreme Court concluded that:

> Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from "any" liability associated with flood control. As the Court of Appeals for the Eighth Circuit explained three decades ago in National Mfg., § 702c's language "safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language."

James, 478 U.S. at 608, 106 S.Ct. at 3122-23 (quoting National Mfg. Co. v. United States, 210

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[2]33 U.S.C. § 702c provides that "No liability of any kind shall attached to or rest upon the United States for any damage from or by floods or flood waters at any place."

F.2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954)).[3]

We find James to be controlling in this case. There is no question that one of the purposes of the Gavins Point Dam was flood control and navigation. The record shows that at the time of the accident the water level was being monitored for flood control and navigational purposes. Thus, the lake's waters are "contained in . . . a federal flood control project for purposes of or related to flood control," James, 478 U.S. at 605, 106 S.Ct. at

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[3]The Court interpreted "floods or flood waters" in a broad sense. It stated:

> The Act concerns flood control projects designed to carry floodwaters. It is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

James, 478 U.S. at 605, 106 S.Ct. at 3121.

3121, and section 702c is applicable. Id. Since governmental control of these waters was a substantial factor in causing the Zavadils' injuries the United States is immune from liability. Dewitt Bank & Trust Co. v. United States, 878 F.2d 246, 247 (8th Cir. 1989), cert. denied, _____ U.S. _____, 110 S.Ct. 1318, 108 L.Ed.2d 493 (1990); see McCarthy v. United States, 850 F.2d 558, 561-62 (9th Cir. 1988), cert. denied, _____ U.S. _____, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989).[4] Summary judgment was

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[4]The appellant relies upon the Boyd case from the tenth circuit which held that liability associated with the operation of a dam as a recreational facility by the government does not provide sovereign immunity under James. See Boyd v. United States ex rel. United States Army, Corps of Eng'rs, 881 F.2d 895, 900 (10th Cir. 1989); see also James, 478 U.S. at 605 n. 7, 106 S.Ct. at 3121 n. 7. This view has been repeatedly rejected by other circuits. See Dewitt, 878 F.2d at 247; Fryman v. United States, 901 F.2d 79, 81-82 (7th Cir. 1990); Dawson v. United States, 894 F.2d 70, 73-74 (3d Cir. 1990); Mocklin v. Orleans Levee Dist., 877 F.2d 427, 430 (5th Cir. 1989); McCarthy, 850 F.2d 561-62. Plaintiff asserts that the waters in the Gavins dam were being raised by the government for

appropriate and the judgment of the district court is affirmed.[5]

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recreational purposes for the 4th of July. We need not pass upon this distinction since the evidence is clear that the waters in Gavins dam were also being monitored for flood control and navigational purposes. See Fryman, 901 F.2d at 81-82. Included in the allegations of negligence made by the plaintiffs is the government's failure to warn of the abutment which plaintiff struck when he made his unfortunate dive. As the Supreme Court stated in James: "[T]he manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." James 478 U.S. at 610; see also Dewitt, 878 F.2d at 247.

[5]Plaintiffs argue for the first time on appeal that the application of section 702c in this case violates the qual protection clause by unconstitutionally discriminating against those persons injured at federal multipurpose water projects whose purposes include flood control and those injured at similar projects whose purposes do not include flood control. Because this claim was not raised before the district court it is not properly before this court and we shall not consider it. Estes v. United States, 883 F.2d 645, 648 (8th Cir. 1989) (following the general rule that this court will not consider issues not raised below).

IN THE UNITED STATES DISTRICT
FOR THE DISTRICT OF NEBRASKA

DAVID B. ZAVADIL and BARBARA ZAVADIL, Plaintiffs,	)	
v.	)	No. CV 88-L-411
UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF ARMY, U.S. ARMY CORPS OF ENGINEERS, Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on the defendants' motion to dismiss (Filing No. 6). Noting that plaintiffs' response referred to certain depositions and exhibits, the Court proceeds, pursuant to Fed.R.Civ. P. 12(b), to treat defendants' motion as a motion for summary judgment (Filing No. 22).[6]

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[6]The Court notes that defendants objected to the Court's consideration of the deposition and attachments of Peter C. Wegman and plaintiffs' request for judicial notice pursuant to Rule 201. However, given the disposition of this matter, the Court finds defendant's

Plaintiffs bring this suite against the United States, acting by and through the Department of Army, United States Army Corps of Engineers, for injuries incurred by David Zavadil on July 2, 1985, at Lewis and Clark Lake, Gavins Point Dam, South Dakota. Gavins Point Dam, behind which Lewis and Clark Lake was formed, was constructed by the United States Army corps of Engineers as part of the Pick-Sloan plan for development of the Missouri River Basin. A compromise agreement between the Senate and the House of Representatives in the Flood Control Act of 1944 specifically included the construction and development of the Gavins Point Dam. The report specifically noted that the construction of the dam was for the purpose of flood control. S.Doc. No. 247, 78th Cong., 2d Sess. 3 (1944):

> The use of the Garrison, High, Oahe, Big Bend, Fort Randall and Gavins Point Dams and Reservoirs will provide the desired degree of flood control, supply the needs

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objection moot.

> of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

Id.

* * * * * *

> Development of the Missouri River Basis * * * will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife and recreation.

Id.

It is alleged that Mr. Zavadil dove off of a boat dock located on a boat ramp at the Gavins Point Dam, sustaining a fractured dislocation of the spine at C-5 through C-6 level, resulting in quadriplegia. Plaintiffs' action is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq.

The United States relies on 33 U.S.C. § 702c in support of its position that it is immune from suit in this action. Section 702c states, in pertinent part: "[N]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters in any place."

The extent of the immunity afforded by § 702c was considered and delineated in United States v. James, 478 U.S. 597, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986). The clear import of James is that § 702c immunity extends to this case. In James, the Supreme Court held: "the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control as well as to waters that such projects cannot control." Id. at 605, 106 S.Ct. at 3121.

In this case, as in James, the plaintiffs argue that § 702c was intended to grant immunity only in connection with government operation of flood control projects and that this immunity does not extend to injuries arising from mismanagement of recreational activities wholly unrelated to flood control. However, the James Court concluded that the manner in which the government chooses to convey warnings related to recreational activities, including the negligent

failure to do so, is part of the management of the flood control project. Id. at 609-10, 106 S.Ct. at 3123. Accord Richey v. United States, 674 F.Supp. 780 (1987).

Drawing upon the legislative history of the statute, the James Court concluded that Congress clearly intended to protect the United States from becoming liable for any expense other than the direct cost of construction of a flood control project.

> Congress clearly sought to insure beyond doubt that sovereign immunity would protect the Government from 'any liability associated with flood control.' As the Court of Appeals for the Eighth Circuit explained three decades ago in National Mfg., § 702c's language 'safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language.

James, 478 U.S. at 608, 106 S.Ct. at 3122-23 (quoting National Mfg. Co. v. United States, 210 F.2d 263, 270 (8th Cir. 1954)).

Summary judgment is proper if there is no genuine issue of material fact and the moving party should prevail as a matter of law. Fed.R.Civ.P. 56(c). Upon review of a motion for

summary judgment, this Court must give the party opposing the motion the benefit of all favorable factual inferences. Holloway v. Lockhart, 813 F.2d 874, 878 (8th Cir. 1987).

After careful review of this matter and the briefs and supporting evidence submitted by the parties, the Court finds that plaintiffs' action is barred by 33 U.S.C. § 702c.

A separate order will be entered this date in conformity with this memorandum opinion.

TITLE 33 - NAVIGATION AND
NAVIGABLE WATERS
CHAPTER 15. FLOOD CONTROL
33 U.S.C. § 702c (1980)

§ 702c. Expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights

Except when authorized by the Secretary of War [Secretary of the Army] upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War [Secretary of the Army] that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the

United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: Provided, however, that if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War [Army] and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either

the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

(May 15, 1928, ch 569, § 3, 45 Stat. 535.)